Supreme Court, U.S.
FILED

05-72[illegible]

OFFICE OF THE CLERK

No.

In The

Supreme Court of the United States

Thomas Eric Brother, Jr.,
Petitioner,

v.

The State of Texas,
Respondent.

On Petition for Writ of Certiorari
To The Court Of Criminal Appeals of Texas

PETITION FOR WRIT OF CERTIORARI

J. DON CARTER
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QUESTION PRESENTED FOR REVIEW

Under the Fourth Amendment to the United States Constitution, this case presents an issue of technological first impression - the sufficiency of a citizen's "bare bones" cell phone call to establish probable cause to stop and arrest for driving while intoxicated. In this case a citizen placed a cell phone call, while driving her car, to a local police dispatcher describing her view of a possibly intoxicated driver. The dispatcher radioed a patrol officer with no more facts than a citizen was following a possible DWI driver. The dispatcher described the citizen's car. The patrol officer saw no independent facts to support a traffic stop as he approached Petitioner's vehicle. Thus, the issue of the sufficiency of the facts transmitted to the officer and the independent corroboration of an informant's cell phone call necessary to establish probable cause for an arrest, in the context DWI traffic stop as it exists in this case, have not yet been addressed by this Court in this age of universal communication by cellular telephone.

OPINIONS BELOW

The opinion of the Court of Criminal Appeals of Texas, which was scheduled to be published, appears in the Appendix as Brother. State, 166 S.W.3d 255 (Tex.Cr.App.-2005). Also included in the Appendix is a copy of the order of the Second Court of Appeals of Texas in Brother v. State, 85 S.W.3d 377 (Tex.App.--Fort Worth 2002).

GROUNDS FOR JURISDICTION

Because the Texas Court of Criminal Appeals affirmed Petitioner's conviction, the Court of Criminal Appeals' opinion is the opinion by a state court of last resort. Petitioner seeks review under Rule 10.1(c). This Court's jurisdiction is invoked under 28 U.S.C. §1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS

United States Constitution, Amend IV, in pertinent part:

The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, shall not be violated.

STATEMENT OF THE CASE

On October 20, 2000, the district attorney of Tarrant County, Texas, filed a misdemeanor information charging Petitioner with the offense of driving while intoxicated (DWI).[1] CR 1.[2] Petitioner filed a

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[1] Tex. Penal Code, Section 42.04.

[2] References to the clerk's record are notated as CR. References to the

pretrial motion to suppress evidence obtained by the arresting officer. CR 5-11. The trial court called the case for a pretrial hearing on March 9, 2001. CR 31, RR Vol.2 1. After hearing evidence, the court denied Petitioner's motion to suppress the evidence. CR 31; RR Vol.2 77. On April 27, 2001, Petitioner pleaded guilty under a plea bargain agreement subject to an appeal of the motion to suppress. CR 26. The court sentenced Petitioner to a fine of $550, and 90 days in jail probated for two years, and costs of $191.25. CR 26-8.

In this case the state tried Petitioner for driving while intoxicated. Before trial, Petitioner filed his Motion to Suppress. CR 5-11. Defense counsel asserted the motion during a pretrial hearing on March 9, 2001. CR 31, RR Vol.2 1. The trial judge denied the motion at the close of the hearing. CR 31; RR Vol.2 77. The court also signed a written order denying Petitioner' motion to suppress. CR 46. Petitioner pleaded guilty under a plea bargain agreement subject to an appeal of the motion to suppress. CR 26.

For purposes of this petition, Petitioner offers a short summary of the facts surrounding Petitioner's arrest.

Debbie Spencer, a private citizen, was driving home on Highway 121 and the Airport Freeway (Highway 183) from her workplace at the D-FW airport on the night of October 19, 2000. Spencer saw the headlights of a car approaching from the rear. Spencer changed lanes to the left lane to allow the car to pass. The car passed, and Spencer moved back to right lane. The car, a green Saturn, slowed down as it passed. Spencer pulled in behind and followed the Saturn at about 60 miles per hour. Spencer first noticed the Saturn in the City of Grapevine. RR Vol.2 7-11.

Spencer described the Saturn's speed as "erratic". Spencer

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reporter's record are abbreviated as RR.

passed the Saturn and left it behind. Spencer and her passengers discussed the Saturn. Spencer decided to slow down and let the Saturn catch up and pass her. After the Saturn passed her a second time, Spencer called 911 on her cell phone. RR Vol.2 11.

Spencer testified that the Saturn made several lane changes - from one side of the freeway to the other. Spencer was in constant contact with a 911 dispatcher. RR Vol.2 13. The dispatcher instructed Spencer to turn on her emergency flashers as Spencer passed the Chili's restaurant on Highway 820 West. RR Vol.2 34. Spencer continued to follow the Saturn until the 911 dispatcher told her to pull back. Spencer pulled over to the side of the highway and spoke with a police officer. The officer obtained names and address from Spencer and her passengers and released them to go on their way. RR Vol.2 13, 34-7.

When Spencer stopped to talk with the officer, she was in the City of North Richland Hills. RR Vol.2 33.

On cross-examination, Spencer agreed that the Saturn was driving at a normal speed limit. RR Vol.2 21-2. The Saturn was not speeding or weaving when it first passed Spencer. RR Vol.2 22. The Saturn's speed varied between 50 and 60 miles per hour because of traffic. RR Vol.2 24. Spencer agreed that there was a lot of construction and construction barricades in the area where the Saturn was seen to change lanes, the Highway 121 - 820 merge . RR Vol.2 28-32. Spencer testified that the Saturn pulled over immediately when the police officer passed her car. Spencer stopped three car lengths behind the police patrol car. RR Vol.2 37-8.

Officer J.D. Williams of the City of Hurst police department, testified that: "Dispatch advised me a caller was on 911 from a cell phone, and was following what they thought could be an intoxicated driver on 121." RR Vol.2 42. Williams was westbound on Highway 121. He increased his speed a little and saw a Tahoe (Spencer's car)

and a smaller car in front. Williams saw the two vehicles as Spencer activated her emergency flasher. Williams testified that he was outside the city limits of Hurst when he saw the vehicles ahead. RR Vol.2 43-4.

Williams caught the Tahoe and followed for a few moments. He confirmed that the Saturn was the correct car by checking the license plate. Williams passed the Tahoe and stopped the Saturn. RR Vol.2 44.

Williams saw no erratic driving by the Saturn. The Saturn's speed was about 40 mph. RR Vol.2 45. Williams stated that the speed limit was 45 mph because of construction. RR Vol.2 46. Williams identified Petitioner as the driver of the Saturn. RR Vol.46-7.

Williams testified that he stopped the Saturn in North Richland Hills and that he did not activate his patrol car lights until he was in North Richland Hills. RR Vol.2 47, 50. Williams stated that he saw the Saturn "just barely in our city." RR Vol.2 47.

Williams stated that he never contacted North Richland Hills authorities before or after stopping Petitioner's vehicle. RR Vol.2 48.

On cross-examination, Williams stated that Spencer could have been on the Hurst - North Richland Hills border line when she activated her emergency flashers. RR Vol.2 53-4. In fact, Williams placed the Chili's restaurant in North Richland Hills. RR Vol.2 54. Williams stated that as Spencer activated her flashers at the Chili's restaurant she was in North Richland Hills. RR Vol.4 54.

Williams saw Spencer's Tahoe and the Saturn only four or five seconds before Spencer activated her flashers. RR Vol.2 54-5.

Williams saw no erratic driving. Williams did not see the Saturn weave. Williams saw no speeding. RR Vol.2 56.

Williams questioned Petitioner at the street side, performed field sobriety tests, video taped Petitioner at the street side, and placed Petitioner in custody. RR Vol.2 57-61.

Williams took Petitioner to the Hurst city jail where he obtained additional evidence. Petitioner remained in the Hurst jail overnight. RR Vol.2 63.

REASONS FOR GRANTING THE WRIT

THE COURT OF CRIMINAL APPEALS OF TEXAS HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL CONSTITUTIONAL LAW THAT SHOULD BE SETTLED BY THIS COURT AND HAS DECIDED A FEDERAL QUESTION OF CONSTITUTIONAL LAW IN A WAY THAT CONFLICTS WITH RELEVANT DECISIONS BY THIS COURT.

This case presents an issue of technological first impression - the sufficiency of a citizen's cell phone call to establish probable cause to arrest. The issue of corroboration of an informant's cell phone call, in the context DWI traffic stop, has not yet been addressed by this Court.

Because Officer Williams arrested Petitioner outside William's city of jurisdiction, the Court of Criminal Appeals was required under Texas statutes to find that William's possessed probable cause to arrest for DWI before Williams stopped Petitioner's vehicle, as a matter of law.

The Court of Criminal specifically held that William's had probable cause to arrest at the inception of the traffic stop:

[Petitione[illegible] as stopped outside the officer's jurisdiction based on the officer's probable cause that DWI was underway, and the officer so testified.

See Brother v. State, page 9, Appendix A.

It is undisputed that the police dispatched failed to communicate Petitioner's specific driving conduct to Williams before he stopped Petitioner's car.

In this case, Officer Williams was provided no description of Petitioner's actual driving. The 911 dispatcher gave Williams no facts to indicate Spencer's credibility. Williams did not observe anything in Appellant's driving that could objectively be considered criminal conduct. Williams had nothing but the bare facts in the 911 broadcast. Such bare facts: "Dispatch advised me a caller was on 911 from a cell phone, and was following what they thought could be an intoxicated driver on 121" cannot have created probable cause to stop Petitioner's car. Williams had no additional corroborative facts, Williams saw no erratic driving. Williams did not see the Saturn weave. Williams saw no speeding. RR Vol.2 56.

It is well established by this Court that a police broadcast, standing alone, is insufficient to establish probable cause. An officer must have additional corroborative facts within the officer's knowledge, beyond the police broadcast, to give rise to probable cause to arrest. Thus, the Texas Court of Criminal Appeals decided this case in conflict with the established Fourth Amendment jurisprudence of this Court. See *Illinois v. Gates*, 462 U.S. 213 (1983); *Draper v. United States*, 358 U.S. 307 (1959); *Alabama v. White*, 496 U.S. 325 (1990).

If this published opinion is allowed to stand, all that will be necessary in Texas to stop a citizen's car and arrest for DWI is a cell phone call and a police dispatch containing no driving facts.

CONCLUSION

For the reasons outlined above, it is respectfully submitted that this Petition for certiorari review be granted.

Respectfully submitted,

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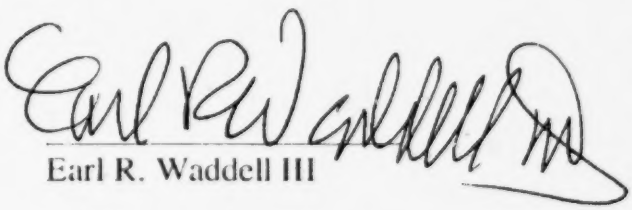
CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing instrument has been served on Mr. Tim Curry, District Attorney for Tarrant County, 401 West Belknap, Fort Worth, Texas 76102 and upon the State Prosecuting Attorney, P.O. Box 12405, Austin, Texas 78711 in accordance with the Texas Rules of Civil Procedure and the Texas Rules of Appellate Procedure on this 1st day of December, 2005.



Earl R. Waddell III

APPENDIX A

THE COURT OF CRIMINAL APPEALS' OPINION